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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JOHN J. TATAR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John J. Tatar petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on April 12, 1971.

OPINION BELOW

The Opinion of the Court of Appeals is not yet officially reported. It is reprinted as Appendix 1, annexed hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 24, 1971 (App. 1). On April 12, 1971 the Court of Appeals denied a Petition for Rehearing (App. 2). On May 12, 1971, this Court, Mr. Justice William O. Douglas, entered an order granting Petitioner an extension of time until June 11, 1971, within which to file a Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231.

QUESTIONS PRESENTED

Petitioner John J. Tatar, who had duly raised the issue of entrapment, was charged with and convicted of violating 18 U.S.C. § 201(b);[1] the Court of Appeals affirmed the conviction after acknowledging that there was a split of judicial opinions on the question of the proper test to be used for determining entrapment as well as on the question of the propriety of the form of instruction used by the District Court.[2] The questions presented in this criminal case involve the issue of entrapment, including the test to be used to determine the existence of entrapment, the propriety of instructions on the issue, the question of whether the District Court should make an independent finding on the issue before presenting it to the jury, and whether, in this

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[1] Petitioner was charged with corruptly promising to give a parcel of land to an agent of the Internal Revenue Service with the intent of inducing him to violate his duty. This was Petitioner's second trial, the first having resulted in a mistrial when the jury was deadlocked.

[2] The Slip Opinion of the Court of Appeals is attached hereto as Appendix 1.

case, there was entrapment as a matter of law. More particularly, the questions are:

1. Did the Courts below err in employing the so-called "predisposition" test under which an accused is to be found guilty if he is found, by the jury, to have had a predisposition to commit the crime (i.e. offer of a bribe), regardless of the suggestive and threatening nature of the Government's conduct leading up to the alleged bribe; and should the Courts below have instead used the "Government conduct" test under which the accused is to be found not guilty if the Government's conduct, prior to the alleged bribe, was so threatening and suggestive as to be reasonably calculated to lead an average innocent person to commit the crime (i.e. offer a bribe) regardless of the state of mind of the particular accused involved?

2. Where in this case the alleged bribe offer was not spontaneous or unsolicited and the entrapment issue was clearly raised:

A. Should the Courts below have found that Petitioner was entrapped as a matter of law, even under the erroneous "predisposition" test? and

B. Should the District Court have made its own independent legal determination, supported by findings and conclusions based on the proper test for entrapment, as to whether there was entrapment before submitting the issue to the jury, a procedure required in the analogous area involving a contest over the voluntariness of confessions?

3. In instructing the jury that it should find Petitioner guilty if he were predisposed to commit the crime, irrespective of the Government's conduct, did the District Court commit reversible error in also in-

structing the jury that there is a "lawful" form of entrapment, an instruction which the Ninth Circuit recognized as having been criticized by the Second and Tenth Circuits but which the Ninth Circuit erroneously found had not been objected to?

4. Were the District Court's instructions so permeated with coercive, prejudicial and confusing remarks as to compel a reversal of the conviction as a matter of law, in that the District Court not only gave the jury the so-called "Allen" charge (itself in disfavor) but went even further in pressing for a verdict by improperly informing the jury that the first trial had ended with a hung jury and that the case would have to be decided by some jury sometime, by extolling the virtue of the Government's case and by advising the jury that the facts were clear despite the fact that the jury had expressed not only confusion but deadlock?

STATEMENT

1. Proceedings Below

The Federal Grand Jury for the Central District of California returned an indictment against Petitioner John T. Tatar charging him with violating 18 U.S.C. § 201(b) by corruptly promising to give a parcel of land to a public official (an agent of the Internal Revenue Service) with the intent of inducing the agent to violate his duty. Petitioner was first tried on December 11 and 12, 1968, but, when the jury deadlocked, a mistrial was ordered. The second trial commenced on March 4, 1969, and on March 7, 1969, a jury found Petitioner guilty as charged. Petitioner was sentenced to the maximum prison term, fifteen years, and a study as described in 18 U.S.C. § 4208(c) was requested by the court. Petitioner appealed to the United States Court

of Appeals for the Ninth Circuit which affirmed the judgment of conviction in an Opinion entered on March 24, 1971 (App. 1). A petition for rehearing was denied on April 12, 1971 (App. 2). Petitioner was granted an extension to June 11, 1971 by Mr. Justice Douglas for the filing of this petition.

At trial, Petitioner properly raised the issue of entrapment, based upon the suggestive and threatening conduct by the revenue agent who had been investigating Petitioner's federal income tax liabilities. The tax audit had been conducted by the agent from March to June, 1968, during which time the agent and Petitioner had a series of meetings. Their discussions during a meeting on June 17, 1968 were, unbeknownst to Petitioner, recorded by an electronic device concealed in the agent's briefcase, and they were also being transmitted to a second nearby recording device manned by additional agents a short distance from the meeting place. (Tr. 49, 64, 67-68, 74, 79, 83 and 106-107).[3]

Although the only issue at trial was whether Petitioner was entrapped by the conduct of the agent, whose tactics of suggestion and threats of punitive tax consequences prior to the charged offer are also evidenced by the transcription of the said meeting between Petitioner and the agent, the District Court at no time made

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[3] The designation "Tr." refers to the transcript of the second trial. The designation "Ct. Exh." refers to the transcription of the tape recorded meeting between Petitioner and Revenue agent Miller on June 17, 1968 which was admitted at trial as a court exhibit. This transcription is reprinted as Appendix 3. Although the court exhibit also includes transcriptions of meetings between Petitioner and agent Miller on June 25, and 26, 1968 (Ct. Exh. pp. 57 et seq.), those parts of the court's exhibit have not been reprinted in Appendix 3 since the prosecution proceeded on the theory that the bribe offer was made on June 17, 1968.

an independent finding as to whether Petitioner was entrapped. During the course of the trial and during the jury's deliberations, the district court instructed the jury on four separate occasions as to the law of entrapment. The first occasion was at the very outset of the trial (Tr. 52-55); the second was at the close of the evidence (Tr. 191-193); the third was during the course of jury deliberations when the jury advised the court that it was confused and desired further instructions (Tr. 202-03); and the fourth was after the jury advised the court that it was deadlocked, at which time the court gave the "Allen" instruction over defense objection and coupled it with other highly impermissible comments, repeating the essence of the entrapment instruction it had previously rendered on three occasions, and then interjecting a new test as it read a supplemental instruction on entrapment requested by the Government, to which the defense had a standing objection (Tr. 129-31, 224-25).[4]

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[4] Reprinted as Appendix 4 is the trial transcript, pages 224-235, which includes:

(A) The receipt of the jury's note stating that an impasse had been reached (Tr. 224);

(B) Defense objections to the reading of the "Allen" charge and to the Government's proposed supplemental entrapment instruction (Tr. 224-25);

(C) The "Allen" charge with extra admonitions (Tr. 225-28);

(D) The fourth reading of the court's entrapment instruction (Tr. 229-32, which is virtually a verbatim repetition of the instruction given on three earlier occasions during the trial);

(E) The addition of the Government's supplemental instruction pertaining to "lawful" and "unlawful" entrapment (Tr. 231-32);

(F) The court's final admonition to the jury to "keep in mind the Allen instruction," and that the facts in this case were clear (Tr. 233); and

(G) The defense motion for a mistrial (Tr. 235).

Both the District Court and the Ninth Circuit used the so-called "predisposition" test, under which entrapment may not be found despite suggestive and threatening conduct by the Government, as long as the accused is found to have had a predisposition to offer a bribe. This approach rejecting the "Government conduct" test, was explicitly stated in the District Court's instructions which were given on four separate occasions as noted above. The supplemental instruction, adding a new element (i.e. lawful *versus* unlawful entrapment), and given for the first time only after the jury became deadlocked, was as follows:

> The law recognizes two kinds of entrapment, unlawful and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction in such a case.
>
> On the other hand, where a person had the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment. (Tr. 231; App. 4, p. 49a).

After this last instruction was given, combining the "predisposition" test with a charge that some kinds of entrapment may be "lawful," several more comments and questions by the jury illustrated their continuing confusion. (Tr. 232-33; App. 4, p. 50a). The court then commented:

> More confused?
>
> Well, keep in mind the Allen instruction. This says that the case can't be tried any better. Everything that you know about this case has been given

> to you. And probably you will never have a case that has the facts more clearly set forth because of the transcript. (Tr. 233; App. 4, p. 51a).

The jury retired to deliberate, Petitioner's counsel moved for a mistrial, and the motion was denied (Tr. 233-35; App. 4, pp. 50a-52a).

In the Ninth Circuit, Petitioner argued, as he had done in the trial court, that there was entrapment as a matter of law and, further, that it was error for the court to instruct as it did. Although the Ninth Circuit recognized a difference of judicial opinion on the "predisposition" and "Government conduct tests, and acknowledged the criticism directed to the "lawful entrapment" instruction by two other Courts of Appeals, it nevertheless erroneously found that Petitioner had not raised the issue of the instruction; the Ninth Circuit disregarded the Allen charge, and, despite the error of the form and substance of the District Court's instructions, opined that Petitioner would have been found guilty even if an instruction based on the "Government conduct" test had been given. However, in attempting to justify the conviction under the "Government conduct" test, the Ninth Circuit, evidencing the confusion in this area, nevertheless lapsed back into the "predisposition" test, making that test determinative by relying upon Petitioner's "previous statements indicating a desire to offer a bribe." (App. 1, p. 5).

The Ninth Circuit not only used the wrong standard in attempting to make the very legal determination which should have been made by the District Court, but it also attempted to guess what the jury would have done if properly instructed, an impossible exercise for the Ninth Circuit in view of the confusion and dead-

lock which existed among the jurors during their deliberations.

2. Facts Relating to the Entrapment

It is undisputed that the agent, after four meetings with Petitioner, went to the fifth meeting on June 17, 1968, with the subject of a potential bribe on his mind. (Tr. 106-107.) The agent had previously discussed Petitioner's tax liability in prior meetings, including that relating to Petitioner's purchase and sale of lots of land in Nevada, and this provided the background for the recorded conversations on June 17, 1968.

The agent, during the recorded interview, repeatedly voiced grave concern as to the magnitude of Petitioner's tax problems and potential liabilities, including Petitioner's failure to file a 1967 income tax return, even though it was only June, 1968, and even though the agent's audit was limited to years prior to 1967. (Ct. Exh. pp. 10-25; App. 3, pp. 14a-25a). While the agent kept reiterating incriminating charges and predicting dire consequences, he also kept shifting discussions to the Nevada real estate which Petitioner had been, and was then in the process of, buying and selling. (Ct. Exh. pp. 12, 22-23, 25 et seq; App. 3, pp. 15a-16a, 22a-23a, 24a, *et seq*). After each such thrust, the agent then took a noncommittal position, making statements such as "what would you suggest I do?" (Ct. Exh. pp. 42, 43; App. 3, p. 35a).

The Petitioner responded to such thrusts and questions by stating that the agent should determine what was owed and that he would willingly pay any taxes found to be due once the agent concluded his audit. (Ct. Exh. pp. 13-14, 20, 23; App. 3, pp. 16a-17a, 21a, 23a). After such discussions and just prior to the time

when the Government contends a bribe offer took place, they had the following dialogue:

> Petitioner: "Well, anyway, you figure it out and I'm not going to argue with you."
> Miller: "Well, I don't want to argue either."
> Petitioner: "You figure out what you think I should do and I'll try and do it.
> Miller: "What do you mean what I think I should do? or you should do?"
> Petitioner: "Whatever you think I should do with this here, with the income tax. You figure out what you think is right for both sides and I'll just pay whatever I have to pay." (Ct. Exh. p. 42; App. 3, p. 35a).

Immediately thereafter agent Miller asked a series of baited questions such as "what would you suggest I do, I mean if I didn't—," followed by "how would you want me to do it?" and "well, I just wanted to hear how you wanted me to do it." (Ct. Exh. pp. 42-43; App. 3, p. 35a). Thereafter the charged bribe offer began to take shape, wherein the Government contends that Petitioner offered the agent some land in Nevada with an improper motive.

The evidence uncontrovertibly showed that Petitioner, even after contacts with the agent over three months and after the above noted discussions on June 17th, was still suggesting that the agent complete his audit and determine what was due, which amount Petitioner would pay. Since the alleged bribe took place only after such discussions and after the agent purposefully did not accept the lawful solution suggested by Petitioner, it was incumbent upon the Government to prove a predisposition on the part of Petitioner to offer a bribe, despite the fact that he offered to pay

what was due. Since the discussions during the first eighty percent of the June 17th meeting were diametrically opposed to any predisposition by Petitioner to offer a bribe, at trial the agent testified to a conversation he had with Petitioner on June 11, 1968 wherein the agent thought that an alleged predisposition was shown. (Tr. 80-81).

The agent testified that, on June 11th, Petitioner asked the agent if the agent would like Petitioner to get a lot of land for the agent for a cost of $250.00 (the cost Petitioner had been incurring for such lots). When the agent said that $250.00 was a lot of money, Petitioner said "Don't worry about it, just give me your name and address and I will take care of the rest." (Tr. 82). This June 11th conversation was not recorded; it was merely testified to as such by the agent. Nor does the Government contend that this conversation constituted an attempted bribe, but only that it showed a predisposition to commit such a crime. However, on June 17th, as noted above, Petitioner's position was anything but one of offering a bribe, and the alleged bribe did not occur until the agent repeatedly intimidated Petitioner and refused to pick up Petitioner's suggestion that the agent determine what tax was due, which amount would be paid; and only after the agent's leading questions such as "What would you suggest I do, I mean if I didn't—"(Ct. Exh. p. 42; App. 3, p. 35a), did the alleged offer take place. In view of this, the ambiguous conversation of June 11th is a slender reed at best on the question of predisposition, and yet it was upon an inference from that June 11th conversation that the Ninth Circuit relied in upholding the conviction despite the acknowledged infirmities in the instructions combined with the potentially preju-

dicial effect of an embroidered Allen charge on a deadlocked jury. It is Petitioner's contention that, as a matter of law, entrapment was shown consistent with this Court's decision in *Sherman* v. *United States*, 356 U.S. 368 (1958), that predisposition was not shown, and that, in any event, the jury was not properly instructed so as to assure a proper verdict.

REASONS FOR GRANTING THE WRIT

There are three independent reasons why a Writ should be granted: *First*, there is a need for a clarification and a resolution by this Court of the confusion which exists among opinions on the definition of entrapment and the manner in which the doctrine should be explained to juries. *Secondly*, there is, in this case, the question of whether the trial court so far departed from accepted and usual judicial proceedings in its manner of instructing the jury after it became deadlocked, both on the question of additional entrapment instructions and on the question of coercing the deadlocked jury into reaching a verdict, as to call for an exercise of this Court's power of supervision to assure a fair trial and due process of law. *Thirdly*, there is an important question relating to the administration of federal criminal law which has not been passed upon by this Court, whether federal trial courts should, in criminal cases involving a clear issue of entrapment, conduct an independent proceeding without a jury (as in confession cases) to determine whether Government conduct relevant to the issue of entrapment has gone beyond the pale of acceptable law enforcement, thereby requiring a dismissal of the criminal prosecution. Each of these points is hereinafter discussed.

1. Clarification of the Law of Entrapment.

Although this Court has spoken on the issue of entrapment in 1958 [*Sherman* v. *United States* and *Masciale* v. *United States,* 356 U.S. 368, 386] and in 1963 [*Lopez* v. *United States,* 373 U.S. 427], there are still not only open questions but there is a conflict among judicial opinions as the Ninth Circuit in this case acknowledged. In view of the real danger of expertly subtle suggestion, persuasion and threat, of which law enforcement officials may be capable, it is vitally important to determine which of the two tests is to control: to determine the question of entrapment, is a court and jury to probe the mind of an accused (who may not testify, as in this case) to determine an illusory or at least highly subjective state of mind, namely "predisposition"; or is the jury objectively to evaluate the Government's conduct to determine whether it could have led an average innocent person into committing a crime he would otherwise not have committed?

The objective standard of evaluating the Government's conduct is not only easier and more subject to evaluation and review, but is more in keeping with analogous areas of the law (such as the voluntariness of confessions and search and seizure) where the Government conduct is the predominant or determinative yardstick. It is a paradox to inquire into the highly subjective and difficult area of "predisposition" while seemingly ignoring Government conduct which is oppressive or overbearing on its face.

From *Sorrells* v. *United States,* 287 U.S. 435 (1932), to *Lopez, supra,* the language of this Court has focused on whether or not an alleged offense was the product of

threatening and suggestive activity of law enforcement officials. Nevertheless, in this case, the courts below have distorted this concern by focusing on whether the accused was predisposed to commit the crime charged, irrespective of the creative activity of Government agents. (Seen Ninth Circuit opinion below, Appendix 1, pp. 4a-5a). It is submitted that this Court has defined a doctrine of entrapment out of concern over Government conduct, with possible predisposition by an accused as purely a subsidiary consideration. If that is so, the jury instructions used below abandoned this concern, at four junctures in the trial, when the court in effect told the jury that if they found a predisposition on the part of Petitioner they need not even consider the activities of the Government's agent. There is a need, therefore, not only to resolve differences of view but also to assure consistency with the principles enunciated by this Court.

In addition to resolving which test is the proper one, it should also be determined whether entrapment is to be deemed, and expressed to the jury as, a defense. In the trial in this case the District Court referred to entrapment as a "defense" on more than twenty occasions, and it is difficult to see how a jury could keep from being confused by the coupling of such repeated descriptions with the court's instruction that the Government had the burden of proof. To refer to entrapment as a defense can only detract from the heavy burden of proof on the Government, and to avoid such detraction and resulting confusion, the term "defense" should be eliminated in the description of the concept of entrapment.

Moreover, the difference of opinion among circuits on the propriety of instructing the jury as to "lawful en-

trapment" begs for resolution. *United States* v. *Pugliese,* 346 F.2d 861 (2nd Cir. 1965); *Garcia* v. *United States,* 373 F.2d 806 (10th Cir. 1967); and *Martinez* v. *United States,* 373 F.2d 810 (10th Cir. 1967). Not only must this conflict be resolved, but this is an appropriate case for such resolution. Notwithstanding the Ninth Circuit's assumption that no objection was made to this charge when the jury became deadlocked, the instruction was given over Petitioner's objection (Tr. 224; App. 4, p. 45a. See also Tr. 129-131). Moreover, this case not only combines errors regarding the concept of entrapment with errors in instructions, but does so in the context of a case tainted by the giving of a magnified "Allen" charge.

2. The Totality of the Court's Instructions, Including the "Allen" Charge With Additional Impermissible Comments, So Coerced the Jury as To Require an Exercise of This Court's Supervisory Power in Reversing the Conviction.

Petitioner was convicted at his second trial. The first trial ended with a hung jury. The second trial appeared to be ending in the same fashion when the trial court intervened and by wholly impermissible and coercive handling of the jury, produced a verdict.

When the jury in this case reported its inability to reach a verdict after less than five hours of deliberation (Tr. 200-201, 219-220, 224), the District Court, *sua sponte,* gave the jury the so-called "Allen" charge, including the admonition, to the minority jurors only, that they should reexamine their position. (Tr. 226-227; App. 4, pp. 46a-47a).[5] The District Court's remarks went even beyond the acknowledged coercive effect of the Allen charge when it instructed the jury

[5] *Allen* v. *United States,* 164 U.S. 492 (1896).

that it "should consider that the case at some time must be decided, some time it has to be decided" (Tr. 226; App. 4, p. 46a) and further that:

> This is the second time that this case has been tried. There was a trial a month ago and the jury was hung up. And this is the second time. (Tr. 225; App. 4, p. 45a).

The coercive effect of such language on an admittedly confused and deadlocked jury was accentuated by the court's further instructions when, on the heels of the foregoing, it repeated the entrapment instructions previously given and, for the first time (at the Government's request made earlier), gave a new and additional instruction that there may be "lawful" as well as "unlawful" entrapment (the formulation criticized by two Circuits). This obviously created even more confusion since the jury, after such instruction, asked several questions and the court responded (Tr. 232-33; App. 4, pp. 50a-51a):

> More confused?
>
> Well, keep in mind the Allen instruction. This says that the case can't be tried any better. Everything that you know about this case has been given to you. And probably you will never have another case that has the facts more clearly set forth because of the transcript.

Not only was this last comment even more confusing, but it was legally prejudicial since only the Government had presented evidence and such remarks tended to give the Government's case an aura of clarity and persuasiveness which had obviously not been the jury's impression. As noted, Petitioner objected and his motion for a mistrial was denied.

The District Court not only used the "Allen" charge in its most virulent form, a use proscribed in several circuits and states,[6] but it went far beyond the *Allen* formulation and had an obviously coercive and prejudicial effect which was totally unwarranted on the basis of the evidence presented. On the basis of well established authority, such remarks constitute reversible error.[7]

While this Court's decision in *Jenkins* v. *United States*, 380 U.S. 445 (1964), requires reversal because the trial court's comments in this case went far beyond the "Allen" charge, this case is also an appropriate vehicle for determining whether the basic "Allen"

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[6] See *United States* v. *Fiorvaventi*, 412 F. 2d 407 (3rd Cir. 1969), *cert. den. sub nom. Panaccione* v. *United States*, 396 U.S. 837 (1969); *United States* v. *Wynn*, 415 F. 2d 135, 137 (10th Cir. 1969); *State* v. *Thomas*, 86 Ariz. 161, 342 P. 2d 147 (1959); *State* v. *Randall*, 137 Mont. 534, 353 P. 2d 1054 (1960); *Commonwealth* v. *Spencer*, 9 Cr. L. Rptr. 2075 (Pa. March, 1971); *Thomas* v. *United States*, 8 Cr. L. Rptr. 2141 (D. C. Cir. Nov. 6, 1970), *vacated for In Banc consideration* (January, 1971). See also *ABA Standards Relating to Trial by Jury* (Approved 1968), Section 5.4.

[7] *Jenkins* v. *United States*, 380 U.S. 445 (1964) ("You have got to reach a decision in this case."), *rev'g* 330 F. 2d 220 (D.C. Cir. 1964); *Williams* v. *United States*, 338 F. 2d 530, 532 (D. C. Cir. 1964); *United States* v. *Rogers*, 289 F. 2d 433, 435 (4th Cir. 1961); *Powell* v. *United States*, 297 F. 2d 318 (5th Cir. 1961); *United States* v. *Harris*, 391 F. 2d 348, 355 (6th Cir. 1968) (second trial; "This law suit must be decided—it must be decided at some time by some jury."); *United States* v. *Tolbert*, 406 F. 2d 81, 86 (7th Cir. 1969) and the dissenting opinion in *United States* v. *White*, 382 F. 2d 415, 450 (7th Cir. 1967) ("The statement is untrue" that the case must be decided sometime by some jury.); *Kawakita* v. *United States*, 190 F. 2d 506, 528 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952) (The "Allen" charge question was not raised in the Supreme Court; see arguments of counsel at 96 L. Ed. 1253-54) and see also *Sullivan* v. *United States*, 414 F. 2d 714, 716 (9th Cir. 1969).

charge itself is such an invalid and coercive intrusion into proper jury deliberations as to be deemed erroneous as a matter of law.

3. This Court Should Require a Hearing and Decision by Trial Courts Without a Jury on the Issue of Entrapment.

In 1958, in *Sherman* v. *United States, supra,* a majority of five justices of this Court reversed a conviction without reaching the minority view (reflected in the concurring opinion of Mr. Justice Frankfurter joined by Justices Douglas, Harlan and Brennan) that entrapment should be decided by trial courts in the first instance because the doctrine of entrapment is based on a concern that the Government obtain convictions by lawful means. As stated by Justice Frankfurter, the Government may not abuse and direct its power "to bring about the downfall of those who, left to themselves, might well have obeyed the law." The doctrine is concerned with "blocking off areas of impermissible police conduct," and it is therefore "appropriate for the court and not the jury" to decide issues of entrapment fairly raised. 356 U.S. 378 at 384-85.

Six years later, although in the context of coerced confessions, these identical considerations were embraced by this Court. *Jackson* v. *Denno,* 378 U.S. 368 (1964). In *Jackson,* this Court determined that the voluntariness of confessions must be determined by a trial judge in the first instance, and only if the trial court finds that a confession was voluntary, would it be submitted to the jury for an independent finding.

In the *Sherman* case, the Court's majority equated entrapment with coerced confessions in the context of impermissible Governmental activity. Quoting from *Sorrells, supra,* 287 U.S. at 442, the Court in *Sherman*

noted that the detection of criminal activity may require stealth and strategy by the police. The Court noted, however, that:

> a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute . . . *Then stealth and strategy become as objectionable police methods as the coerced confession* and the unlawful search. 356 U.S. at 372 (emphasis added).

It is ironic that in 1958 this Court equated entrapment with coerced confessions, and in 1964 prescribed a specific procedure for trial court determinations of the legality of Government conduct in obtaining confessions—a procedure suggested earlier in the concurring opinion in *Sherman* with regard to entrapment—but as yet the analogous issue of entrapment has been denied equivalent judicial consideration.

In reaffirming the need for independent judicial review, a principle which is common to the areas of coerced confessions and entrapment, this Court should require that the same judicial attention and comparable procedures be devoted to cases involving entrapment as are devoted to cases involving confessions. As previously stated in opinions in this Court:

> It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law. *Sorrells,* 287 U.S. at 457 (separate opinion by Mr. Justice Roberts).
>
> Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant

> guidance for official conduct in the future. Only the court, through the gradual evolution of of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands. *Sherman,* 356 U.S. at 385 (concurring opinion of Mr. Justice Frankfurter).

The error of the Ninth Circuit's attempt in this case to make a legal determination on entrapement, as well as the futility of its attempt to opine what the jury may have done if instructed differently, illustrate the practical and real need for an initial decision by the District Court which would also have had the opportunity of hearing Petitioner's testimony outside the presence of the jury, and whose decision would provide a meaningful basis for appellate review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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